

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

CHARLES WILLIAMS,
Petitioner,
v.

No. 3:12-cv-00496-HU

FINDINGS AND
RECOMMENDATION

UNITED STATES OF AMERICA, et al.,
Respondents.

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1 HUBEL, J.,

2 Before the Court is petitioner Charles Williams' ("Williams")
 3 petition to quash an Internal Revenue Service ("IRS") third-party
 4 summons and respondent the United States' ("the Government") motion
 5 to summarily deny Williams' petition to quash.¹ For the reasons
 6 stated herein, the Court recommends (1) denying Williams' petition
 7 (Docket No. 1) to quash the IRS' third-party summons; and (2)
 8 granting the Government's motion (Docket No. 4) to summarily deny
 9 Williams petition to quash.

10 ***I. FACTUAL AND PROCEDURAL BACKGROUND***

11 This action arises from an investigation into Williams' tax
 12 liabilities for the 2009 and 2010 tax years. IRS Special Agent
 13 Mike Thornton ("Thornton") was assigned to conduct an examination
 14 of Williams' federal income tax liabilities in 2009 and 2010
 15 because Williams did not file income tax returns for these years.
 16 Pursuant to the investigation, Agent Thornton mailed two letters to
 17 Williams on August 31, 2011, inquiring as to the non-filed income
 18 tax returns.² With this communication, Agent Thornton included
 19 Publication 1 ("Your Rights as a Taxpayer"), which informs
 20
 21

22 ¹ Williams also filed what appears to be a motion for an
 23 extension of time to file an opposition to the Government's motion,
 24 nunc pro tunc. (See Docket No. 7.) This pleading was filed
 25 concurrently with Williams' opposition. Because procedural
 26 requirements are liberally construed for pro se litigants, and
 because the Government did not object to the belated filing, the
 court will consider Williams' opposition in ruling on the
 Government's motion.

27 ² Thornton's two letters were mailed to the same address
 28 provided by Williams on his Petition to Quash IRS Third Party
 Summons.

1 taxpayers that the IRS may contact third parties regarding the
2 investigation, and Notice 609 (Privacy Act Notice).

3 On February 27, 2012, Agent Thornton served an IRS
4 administrative summons on Wells Fargo Bank, directing it to produce
5 "all applications for loans or mortgages made, repayment ledgers
6 for all loans or mortgages (including documentation as to the
7 source(s) of payments) maintained, all checks or other payments
8 instruments reflecting loan payments and/ or deposited into escrow
9 accounts for, and bank statements, deposit slips, cancelled
10 checks, and all signature cards for accounts over which Petitioner
11 or his wife Pat Williams had signatory or other authority during
12 the period January 1, 2009 through December 31, 2010." (Thornton
13 Decl. ¶ 9.) On that same day, Agent Thornton sent Williams a
14 notice of the issuance of the summons of Wells Fargo, a copy of the
15 summons, and a notice explaining Williams' right to bring a
16 proceeding to quash the summons.

17 Williams filed his Petition to Quash IRS Third Party Summons
18 on March 19, 2012 (Docket No. 1) and sent copies of his petition,
19 via certified mail, to Agent Thornton and Wells Fargo.³ On June 6,
20 2012, the Government filed a Motion to Summarily Deny Petition to
21 Quash (Docket No. 4). After the Government's motion was fully
22 briefed, this Court took the matter under advisement.

23 **II. DISCUSSION**

24 In his Petition, Williams argues, among other things, that the
25 summons of Wells Fargo should be quashed because (1) the IRS did
26 not provide Williams with advance notice that contact with Wells

27 ³ Prior to receiving Williams' petition to quash, Agent
28 Thornton had no indication that Williams had received his letters.

1 Fargo would be made or with a record of person contacted by the IRS
2 regarding the investigation into Williams' tax liabilities; (2) the
3 summons violates 26 U.S.C. § 7602(d)(2)(A) because there is a
4 pending Department of Justice referral for criminal prosecution;
5 (3) the IRS abused the summons process and failed to satisfy the
6 standard of good faith set out in *United States v. Powell*, 379 U.S.
7 48, 85 S. Ct. 248, 13 L. Ed. 2d 112 (1964); and (4) the summons
8 violates federal and state privacy laws. The Government asserts
9 that Williams' petition should be summarily denied because the
10 Government has made a prima facie case under *Powell*.

11 The IRS is empowered to issue summons "[f]or the purpose of
12 ascertaining the correctness of any return, making a return where
13 none has been made, determining the liability of any person for any
14 internal revenue tax . . . or collecting any such liability." 26
15 U.S.C. § 7602(a). When the subject party of an investigation
16 objects to the issuance of a third-party summons, he may file a
17 petition to quash pursuant to 26 U.S.C. § 7609.

18 In order to defeat a petition to quash and compel compliance,
19 the Government must establish that (1) an investigation is being
20 conducted for a legitimate purpose; (2) the material being sought
21 is relevant to that purpose; (3) the information sought is not
22 already in the IRS's possession; and (4) the IRS complied with
23 required administrative steps. *Crystal v. United States*, 172 F.3d
24 1141, 1143-44 (9th Cir. 1999) (citation omitted). "The
25 government's burden is a slight one, and may be satisfied by a
26 declaration from the investigating agent that the *Powell*
27 requirements have been met." *Id.* at 1444 (quoting *United States v.*
28 *Dynavac, Inc.*, 6 F.3d 1407, 1414 (9th Cir. 1993)).

1 Once the Government has established a prima facie case to
2 enforce the summons, "those opposing enforcement of a summons . . .
3 bear the burden to disprove the actual existence of a valid civil
4 tax determination or collection purpose by the Service. . . .
5 Without a doubt, this burden is a heavy one." *Crystal*, 172 F.3d at
6 1144 (quoting *United States v. Jose*, 131 F.3d 1325, 1328 (9th Cir.
7 1997)). Put another way, "[t]he burden then shifts to the taxpayer
8 to show an abuse of process, e.g., that the summons was issued in
9 bad faith for an improper purpose," *Liberty Fin. Serv. v. United*
10 *States*, 778 F.2d 1390, 1392 (9th Cir. 1985), keeping in mind that
11 "[e]nforcement of a summons is generally a summary proceeding to
12 which a taxpayer has few defenses." *United States v. Derr*, 968
13 F.2d 943, 945 (9th Cir. 1992).

14 Here, the Government has filed Agent Thornton's declaration
15 (Docket No. 6), which states that the investigation was commenced
16 for a legitimate purpose and the material being sought is relevant
17 to that purpose: "The information and documents [sought from Wells
18 Fargo] are needed to reconstruct Petitioner's income from 2009 to
19 2010, which is relevant to the determination of Petitioner's
20 correct income tax liabilities." (Thornton Decl. ¶ 10.) The
21 declaration further states "[t]he IRS d[oes] not possess any of the
22 information or documents requested[.]" (Thornton Decl. ¶ 9.)
23 Lastly, Thornton's Declaration indicates that "[a]ll administrative
24 steps required by the Internal Revenue Code for issuance of the
25 summons . . . have been taken," including sending Williams the
26 notices required by 26 U.S.C. § 7609(a). (Thornton Decl. ¶¶ 4-
27 17.) Thus, I conclude the Government has established a prima facie
28 case to enforce the summons based on Agent Thornton's declaration.

1 See *Action Recycling v. United States*, No. CV-11-00457-JLQ, 2012 WL
2 695463, at *2 (E.D. Wash. Mar. 1, 2012) (same).

3 Williams, however, has failed to meet his *heavy* burden of
4 showing the Government acted in bad faith or issued the summons as
5 an abuse of process. In fact, all of the defenses raised by
6 Williams can be quickly disposed of. First, Williams' petition
7 states: "The Summons . . . should be quashed because [the] IRS
8 failed to give [me] timely notices require by . . . [s]ection
9 7609(a)(1), *i.e.*, 20 days notice prior to the date set to turn over
10 the records requested." (Pet. Quash ¶ 8.) Section § 7609(a)(1)
11 requires the IRS to notify the taxpayer of any third-party summons
12 (1) within three days after the summons was served on the third-
13 party, and (2) no later than twenty-three days before the date
14 fixed in the summons when records must be produced. According to
15 Agent Thornton, he sent a copy and notice of issuance of the
16 summons via certified mail to Williams' last known address on
17 February 27, 2012, the same day the IRS issued the summons to Wells
18 Fargo. Wells Fargo was not required to produce records pursuant to
19 the summons until March 26, 2012. Because it is clear the IRS
20 complied with § 7609(a)(1), Williams' first defense fails.

21 Second, in Paragraph 9 of his petition, Williams argues that
22 the IRS violated 26 U.S.C. § 7602(c), which requires the IRS to
23 provide "reasonable notice in advance to the taxpayer that contacts
24 with persons other than the taxpayer may be made," and
25 "periodically provide to a taxpayer a record of persons contacted"
26 during the investigation. 26 U.S.C. § 7602(c)(1)-(2). In this
27 case, Agent Thornton sent Williams two letters on August 31, 2011
28 -- well before the summons issued on February 27, 2011 -- informing

1 him that the IRS might contact third parties. The letters informed
2 Williams of his right to request a list of parties that the IRS
3 contacted. Thus, the IRS gave Williams "reasonable notice" under
4 § 7602(c)(1). Williams also argues that the IRS violated §
5 7602(c)(2) by not providing him a list of all third parties that
6 the IRS contacted pursuant to its investigation. However, the
7 Government was under no obligation to notify Williams under §
8 7602(c)(2) of its issuance of the summons to Wells Fargo because he
9 already has such notice under 7609(a)(1). See *Peterson v. United*
10 *States*, 2012 WL 682346, at *4 (E.D. Pa. Mar. 2, 2012) ("A
11 post-contact record under this section need not be made, or
12 provided to a taxpayer, for third-party contacts of which the
13 taxpayer has already been given a similar record pursuant to
14 another statute, regulation, or administrative procedure." (quoting
15 26 C.F.R. § 301.7602-2(e)(3))). And Williams has not provided any
16 evidence that the IRS contacted any parties other than Wells Fargo.

17 Third, Williams alleges that the summons was "issued while a
18 referral for criminal prosecution to the Department of Justice is
19 pending . . . in violation of" 26 U.S.C. § 7602(d)(2)(A). Williams'
20 third defense is without merit, seeing as no such referral was
21 pending at the time Agent Thornton issued the summons. (Thornton
22 Decl. ¶ 11.)

23 Fourth, Williams claims that the IRS is abusing the summons
24 process by issuing multiple summonses in multiple jurisdictions.⁴

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26 ⁴ Presumably, this argument is based on the fact that
27 summonses were previously issued to Wells Fargo and Aurora Loan
28 Services on January 8, 2010, for the tax periods 2005-2008. After
Williams and his wife filed a petition to quash in the United
States District Court for the Northern District of Texas, the court

1 However, this argument lacks merits. To quote the *Peterson* court:
2 "Congress has endowed the IRS with expansive information-gathering
3 authority. . . . [Yet,] Petitioner cites no rule of law precluding
4 the IRS from issuing summonses to entities in multiple
5 jurisdictions, and the Court has been unable to find any. Thus,
6 petitioner's fourth defense [fails]." *Peterson*, 2012 WL 682346, at
7 *5 (internal citation omitted).

8 Fifth, Williams contends that the IRS has failed to meet the
9 "good faith" requirement set forth in *Powell*. The absence of good
10 faith, according to Williams, stems from "the admission of Revenue
11 Agent Thornton, in his declaration, [that] the IRS failed to comply
12 with all administrative procedures." (Pet'r's Opp'n at 3.) This
13 simply is not true. Agent Thornton's declaration unequivocally
14 states that "[a]ll administrative steps required by the Internal
15 Revenue Code for issuance of the summons . . . have been taken."
16 (Thornton Decl. ¶ 17.) Simply put, Williams "has not shown that
17 the IRS's investigation is for any purpose other than to determine
18 tax liability or to 'inquir[e] into any offense connected with the
19 administration or enforcement of the internal revenue laws.'" *Waller v. United States*, 302 F. App'x 656, 657-58 (9th Cir. 2008)
20 (quoting 26 U.S.C. § 7602(a)-(b)).

22 Sixth, Williams claims the IRS has "caused, or will cause,
23 [his] records to be turned over to Wells Fargo in violation of the
24 Privacy Laws of the United States of America" and the State of
25 Texas," even though the records requested are to be produced by

26 _____
27 dismissed the petition for lack of jurisdiction because the third-
28 party record-keepers did not reside in that district, and the
dismissal was subsequently upheld on appeal.

Wells Fargo, not the IRS. (Pet. Quash ¶¶ 13-14.) Although it is not entirely clear what "Privacy Laws" on which Williams bases his claims, the Right to Financial Privacy Act, 12 U.S.C. §§ 3401 et seq., states: "Nothing in this chapter prohibits the disclosure of financial records in accordance with procedures authorized by [the Internal Revenue Code]." 12 U.S.C. § 3413(c). And "the Supreme Court has held that the notice requirements [set forth] in 26 U.S.C. § 7609(a) . . . mitigate any privacy concerns in situation such as this, where the IRS knows the identity of the target of the investigation." *Peterson*, 2012 WL 682346, at *5 (citation omitted). I therefore reject Williams' sixth defense.

Lastly, Williams argues that the IRS violated the Fourth and Fourteenth Amendments to the United States Constitution. The district court disposed of a similar argument in *Moyes v. United States*, 2010 WL 3432246 (E.D. Cal. Aug. 31, 2010), stating:

The Supreme Court has . . . held that a customer of a bank cannot, on Fourth Amendment grounds, challenge the admission into evidence of financial records obtained by the government from his or her bank. . . . Therefore, [Petitioner] does not have a protected Fourth Amendment right that would be violated by [the third-party]'s compliance with the IRS summons. . . . [Similarly,] the Due Process Clause is not implicated when a federal administrative agency uses its subpoena power to gather evidence against a taxpayer because an administrative investigation adjudicates no legal rights.

Moyes, 2010 WL 3432246, at *5 (internal citations omitted). Much the same can be said here.

III. CONCLUSION

Consistent with the discussion above, the Court recommends (1) denying Williams' petition (Docket No. 1) to quash the IRS' third-party summons; and (2) granting the Government's motion (Docket No. 4) to summarily deny Williams petition to quash.

1 **IV. SCHEDULING ORDER**

2 The Findings and Recommendation will be referred to a district
3 judge. Objections, if any, are due **February 11, 2013**. If no
4 objections are filed, then the Findings and Recommendation will go
5 under advisement on that date. If objections are filed, then a
6 response is due **February 28, 2013**. When the response is due or
7 filed, whichever date is earlier, the Findings and Recommendation
8 will go under advisement.

9 Dated this 23rd day of January, 2013.

10 /s/ Dennis J. Hubel

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13 DENNIS J. HUBEL
14 United States Magistrate Judge
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